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No.-----

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FEDERATION INTERNATIONALE DE BASKETBALL AMATEUR,

Petitioner,

v.

RONALD BEHAGEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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February 4, 1985

QUESTION PRESENTED FOR REVIEW

Whether an international sports federation located in Germany is subject to *in personam* jurisdiction in Colorado for denying an athlete the right to play amateur basketball in Italy.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court below were Ronald Behagen, as appellant, and Federation Internationale de Basketball Amateur, as appellee. The Amateur Basketball Association of the United States of America and its executive director, William Wall, are parties defendant in the district court proceeding, but did not participate in the appeal to the court below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS IN THE COURTS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Organization of International Amateur Basketball 2

B. ABA/USA, FIBA's United States Member 4

C. Behagen's Basketball Career 4

D. History of the Case 6

REASONS FOR ALLOWING THE WRIT 7

ARGUMENT 8

A. The Court of Appeals' Decision Is in Conflict with This Court's Decision in *Helicopteros* 8

B. The Court of Appeals' Decision Extends *In Personam* Jurisdiction Over Foreign Entities to a Dangerous and Unprecedented Limit 13

CONCLUSION 15

APPENDIX A

United States Court of Appeals for the Tenth Circuit, Opinion 1a

APPENDIX B

United States District Court for the District of Colorado, Order 10a

APPENDIX C

United States Court of Appeals for the Tenth Circuit, Petition for Rehearing Denied 14a

TABLE OF AUTHORITIES

CASES

	Page
Helicopteros Nacionales de Colombia, S.A. v. Hall, 104 S. Ct. 1868 (1984)	6,7,8 10,12,13
International Shoe Co. v. Washington, 326 U.S. 310 (1945)	8,9,14
Kulko v. Superior Court of California, 436 U.S. 84 (1978)	8
McGee v. International Life Insurance Co., 355 U.S. 220 (1957)	9
Perkins v. Benquet Consolidated Mining Co., 342 U.S. 437 (1952)	9,10, 11,12
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)	9

OTHER AUTHORITIES

28 U.S.C. § 1254 (1) (1982) 2

36 U.S.C. § 391 (1982) 4

36 U.S.C. § 391 (a) (1982) 4

Fifth and Fourteenth Amendments to the United States Constitution 2

Fed. R. Civ. P. 12 (b) (5) 6

Rule 17, Supreme Court Rules 8

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RONALD BEHAGEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Federation Internationale de Basketball Amateur ("FIBA") prays that a writ of certiorari issue to review the opinion of the Court of Appeals for the Tenth Circuit reversing the judgment of the District Court for the District of Colorado. The court of appeals held that a German sports federation is subject to *in personam* jurisdiction in Colorado for denying an athlete the right to play amateur basketball in Italy.

OPINIONS IN THE COURTS BELOW

The opinion of the Tenth Circuit Court of Appeals is reported at 744 F. 2d 731, and a copy is appended. App. A. The opinion of the district court is unreported, and a copy is appended. App. B.

JURISDICTION

The opinion of the court of appeals (App. A) was entered on September 20, 1984. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on November 6, 1984. App. C. This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254 (1) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments of the United States Constitution provide in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

This is an action by Ronald Behagen ("Behagen"), a Georgia resident, against FIBA, the Amateur Basketball Association of the United States of America ("ABA/USA"), and William Wall, ABA/USA's executive director, alleging that defendants wrongfully refused to reinstate Behagen's amateur international player's license. As a consequence, he claims loss of the benefits of a contract to play basketball with an amateur basketball team in Italy. This Petition does not involve the merits of Behagen's substantive claims; it is limited to whether FIBA is subject to *in personam* jurisdiction in the district court in Colorado for its action in Germany affecting Behagen's right to play amateur basketball in Italy.

A. Organization of International Amateur Basketball

The backdrop for this action is the complicated structure of international amateur athletics. An understanding of that structure, and the relationship among FIBA, ABA/USA, and Behagen in

that structure, is critical in analyzing the far-reaching and adverse effect of the court of appeals' decision in this case.

The International Olympic Committee ("IOC") regulates the entire sport of international amateur basketball. As is known by everyone who owns or has access to a television set, international amateur basketball is on the program of the Olympic Games, which have been conducted and controlled since 1896 by the IOC, headquartered in Geneva, Switzerland. The IOC designates international federations to govern each Olympic sport and organizes and coordinates that sport within the Olympic movement.

The international federation appointed by the IOC, however, has responsibility beyond the organization and conducting of that sport at the Olympic Games. The designated international federation is responsible for all international amateur competition in that sport, whether it leads to or is part of the Olympic Games or relates to wholly separate competitions, such as the Pan American Games.

FIBA is the international federation designated by the IOC to govern the international amateur sport of basketball. FIBA, an international federation with offices only in Munich, Germany, establishes rules and regulations, including eligibility rules for athletes in international amateur basketball, and supervises all international amateur competition in that sport.

As is common in international sports organizations, FIBA is governed by a Congress consisting of a delegate from each of its member nations, in this case totaling 158 separate countries. The Congress adopts and approves FIBA bylaws and elects members of the Central Board, FIBA's executive authority. The 158 member nations are not themselves the members of FIBA. Instead, each country selects a governing body for basketball to be the FIBA member. The manner of selecting the national governing body is left to each member nation.

B. ABA/USA, FIBA'S United States Member

ABA/USA, FIBA's United States member, is the national governing body for amateur basketball in the United States, as designated by the United States Olympic Committee pursuant to 36 U.S.C. § 391(a) (1982). ABA/USA is a nonprofit organization incorporated in Illinois, with headquarters in Colorado Springs, Colorado. As national governing body, ABA/USA has independent authority to determine all matters relating to the governance of amateur basketball in the United States and is free from the control and restraint of any other entity in the performance of its statutory duties. 36 U.S.C. § 391 (1982). Consequently, FIBA has no authority, choice or control relating to the selection of ABA/USA as the national governing body for amateur basketball in the United States, or ABA/USA's presence in Colorado. ABA/USA's duties are predominantly national in scope, including coordinating amateur athletic activity in the United States and establishing procedures for determining eligibility standards for amateur play. FIBA and the IOC have nothing to do with ABA/USA's national duties.

FIBA and ABA/USA have some concurrent activities in the realm of international amateur competition. When a United States amateur basketball team is involved in competition with a foreign team, whether in the United States or in another country, the structure of international amateur competition, as established by IOC rules, dictates that ABA/USA and FIBA work together to coordinate the competition. FIBA, however, operates exclusively internationally in regulating amateur basketball competition throughout the world; ABA/USA operates, pursuant to statute, in regulating amateur basketball in the United States.

C. Behagen's Basketball Career

Behagen was a professional basketball player in the National Basketball Association from 1973 to 1979. In October, 1979, Behagen agreed to play basketball for one season for the Club Mens Sana Siena 3A Antonini, an amateur basketball team located in Siena, Italy, which competes in the Italian basketball

league (the "Italian team").[1] A professional player, however, must be reinstated to amateur status by FIBA before he can play amateur basketball. The Italian team, through the Italian Federation (the Italian counterpart of ABA/USA), applied to and received from FIBA an international player's license for Behagen. That license was valid for one year and permitted Behagen to play amateur basketball in Italy for the 1979-80 season. Behagen played for the Italian team from October, 1979 to mid-March, 1980.

In March, 1980, Behagen again became a professional athlete by signing a contract with and playing for the Washington Bullets of the National Basketball Association. Behagen was not invited to return to the Washington Bullets for the 1980-81 National Basketball Association season.

In the summer of 1980, Behagen agreed to play basketball for the Italian team for the second time. Again, the Italian team, through the Italian Federation, applied to FIBA for a renewal of Behagen's international player's license. FIBA refused the Italian team's request to renew Behagen's international player's license pursuant to its long-standing rule that a professional player could not be reinstated to amateur status more than once. ABA/USA was not involved in that decision. Without that reinstatement, Behagen was not permitted to compete as an amateur basketball player in Italy. Significantly, however, FIBA's application of its rule had no impact on Behagen's rights or activities in the United States: FIBA acted toward Behagen as an Italian amateur player, since the Italian team through the Italian Federation applied for Behagen's amateur license.

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[1] Although the teams in the Italian basketball league pay their players, the league is considered an amateur league by the IOC. Thus, the definition of "amateur" in international athletics differs from the meaning given that term in the United States.

D. History of the Case

Behagen brought suit in the United States District Court for the District of Colorado, alleging that FIBA's refusal to reinstate him to amateur status was wrongful. Behagen asserts claims for breach of contract, denial of due process, tortious interference with his employment contract, and violation of the antitrust laws of the United States against FIBA, ABA/USA, and Wall.

FIBA moved, pursuant to Fed. R. Civ. P. 12(b)(5), to dismiss the Complaint as to it for lack of personal jurisdiction. On February 16, 1983, the district court agreed with FIBA's jurisdictional objection and entered its Order granting FIBA's Motion to Dismiss. App. B.

The district court held that FIBA had insignificant contact, if any, with the United States, and none with the State of Colorado, to justify the exercise of *in personam* jurisdiction over it. The district court accurately characterized the concurrent activities of FIBA and ABA/USA as the necessary result of the nature and structure of international amateur competition, rather than of a business association. Moreover, the district court emphasized that, when FIBA denied Behagen an international player's license, it was acting against his putative right to be an Italian amateur basketball player, and thus any impact felt by Behagen occurred exclusively in Italy. Under these facts, the district court agreed that FIBA could not reasonably have conceived itself, consistent with due process, subject to suit in the United States for taking action in Germany affecting an amateur athlete in Italy.

The court of appeals reversed, holding that it would not offend due process to require FIBA to defend a lawsuit "wherever members conduct FIBA activities." App. A, 7a. It relied on *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 104 S. Ct. 1868 (1984), in deciding that the contacts between FIBA and ABA/USA were sufficient to subject FIBA to *in personam* jurisdiction in Colorado, although admittedly this action did not arise from these contacts. The court of appeals did not consider the structure of international amateur athletics—a structure which

mandates joint activity—in deciding the fairness of subjecting FIBA to jurisdiction in Colorado. Nor did it consider the significance, as is proper in a due process analysis of *in personam* jurisdiction over a foreign entity, that FIBA acted strictly in Germany without impact in Colorado.

Judge Barrett dissented. He agreed with the district court that dismissal of FIBA for want of *in personam* jurisdiction was proper. In particular, Judge Barrett concluded that

> . . . the district court correctly analyzed the structure of FIBA and ABA/USA from the pleadings and concluded correctly that: when FIBA denied Behagen a license to play in Italy, it was acting against him as an Italian, not an American, basketball player; FIBA's action had nothing to do with Behagen's standing as an amateur in America and any impact felt by Behagen was in Italy, not in the United States, for the "right" advanced here by Behagen was that of playing basketball in Italy; giving credence to Behagen's theory could only result in the creation of a right to sue in Italy; . . .

App. A, 8a.

FIBA sought rehearing *en banc*. On November 6, 1984, that petition was denied. Judge Barrett voted to grant rehearing.

REASONS FOR ALLOWING THE WRIT

There are two reasons why FIBA could not have reasonably anticipated being haled into court in Colorado:

First, the court of appeals' decision conflicts with this Court's decision in *Helicopteros* as to the type of contacts required before a foreign entity is subject to the jurisdiction of the forum, where the claim sued upon does not arise in the forum or involve the nonresident defendant's in-state activities.

Second, the court of appeals' decision, finding FIBA subject to jurisdiction in Colorado, is an abrupt departure from the fundamental standards of *in personam* jurisdiction announced by

this Court, and extends *in personam* jurisdiction over foreign entities to an unconstitutional and unpredictable limit. Such a far-reaching extension of *in personam* jurisdiction to the severe detriment of international amateur athletics calls for review by this Court.

Thus, the court of appeals has not only rendered an opinion which differs fundamentally from this Court's prior decisions establishing the scope of *in personam* jurisdiction over foreign entities, but has decided an important question which seriously undermines and unnecessarily disrupts the structure of international amateur athletics and international commerce. The requisite special and important reasons required by Rule 17 of the Rules of this Court are manifestly present.

ARGUMENT

The court of appeals held that FIBA, a German federation, could anticipate defending a lawsuit in Colorado for denying Behagen the right to play amateur basketball in Italy. This is so, according to the court of appeals, because ABA/USA, one of FIBA's 158 members, is located in Colorado. The court of appeals' narrow analysis is erroneous, as it ignores not only the fundamental importance of the nature and quality of contacts on which jurisdiction is based, but also the essential consideration of fairness as articulated by this Court when determining *in personam* jurisdiction over a nonresident.

A. The Court of Appeals' Decision Is in Conflict with This Court's Decision in *Helicopteros*

The cornerstone of due process protection is basic fairness. *Kulko v. Superior Court of California,* 436 U.S. 84 (1978). Basic fairness requires that, before a court can exercise personal jurisdiction over a nonresident defendant, the maintenance of the suit must not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington,* 326 U.S. 310 (1945). For *in personam* jurisdiction over a nonresident to be fair, defendant's "conduct and connection with the forum State [must be]

such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980). By requiring this critical foreseeability, due process "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.*

Common to the broad spectrum of *in personam* jurisdiction cases decided by this Court is an examination of the nature of defendant's activities in the forum. Where the cause of action is alleged to arise out of defendant's conduct in the forum, there is a detailed analysis of the impact in the forum of the very actions underlying the suit. A finding of jurisdiction requires some connection to, some impact in, the forum. This connection was central in the seminal case of *International Shoe.* There, the State of Washington sought to collect unemployment taxes based on commissions defendant paid its Washington-based salesmen. It is clear that the State of Washington's right to collect taxes had an impact on defendant in the forum, and jurisdiction was affirmed. Defendant should reasonably have anticipated that its contacts with its Washington-based salesmen would subject it to suit in Washington. Using a similar analytical process in *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), this Court upheld jurisdiction in California over a Texas company which had issued an insurance policy to a California resident. Again, defendant could reasonably anticipate that its actions infringing plaintiff's rights under the policy had an impact on this California resident in California.

A more comprehensive evaluation of defendant's activities in the forum is made in cases, such as this, when the claim sued upon did not arise in the forum or involve the in-state activities of the nonresident defendant: significantly greater activities in the forum are required before jurisdiction is proper. The first case to focus on jurisdiction based on continuous and systematic corporate activities was *Perkins v. Benquet Consolidated Mining Co.,* 342 U.S. 437 (1952). In that case, plaintiff, a nonresident of Ohio, sued in Ohio

for dividends claimed to be due her as a Benquet stockholder. In upholding the jurisdiction, this Court looked closely at the extent and the nature of the corporation's operations within Ohio to determine whether they justified the maintenance of jurisdiction. Those activities amounted to the carrying on of the company's complete corporate business in the forum. Given the nature of those activities, it was foreseeable that the deprivation of the alleged right to receive dividends would be asserted in Ohio.

Substantial contacts with the forum, however, will not necessarily support jurisdiction. The more recent case of *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 104 S. Ct. 1868 (1984), held that due process would be denied by the assertion of *in personam* jurisdiction by a Texas court over a Colombian corporation where the cause of action did not arise out of the company's Texas contacts. In reaching this conclusion, this Court focused almost exclusively on the *nature* of the foreign corporation's contacts with Texas. As in *Perkins,* there were a number of contacts, spanning a long period of time. Yet, the Court's careful analysis of each individual contact made clear that they were not of the type that should subject a foreign corporation to suit for claims arising out of an accident in Peru. Unlike *Perkins,* the type of contacts of the nonresident defendant in *Helicopteros* did not amount to carrying on its business in the forum.

The court of appeals' decision in this case is sharply at odds with the basic principles of *in personam* jurisdiction as enunciated by this Court. An analysis of FIBA's contacts in Colorado, to the extent they existed at all, and by its United States member, ABA/USA, compels the conclusion that they were not of the type which can support jurisdiction for this foreign-based claim. Indeed, the court of appeals' decision is in conflict with *Helicopteros,* the principal case upon which it relies to support jurisdiction.

Helicopteros, a corporation with its principal place of business in Bogota, Colombia, was engaged in the business of providing helicopter transportation for oil and construction companies in South America. One of its helicopters crashed in Peru, killing four

United States citizens. Plaintiffs, survivors and representatives of the four decedents, instituted a wrongful death action in Texas against Helicopteros and others.

Helicopteros had extensive contacts with Texas, but plaintiffs' claim did not arise out of, and was not related to, Helicopteros' activities within Texas. The facts established these numerous contacts between Helicopteros and Texas:

> 1. In 1974, Helicopteros' chief executive officer flew to Texas to discuss the business specifics of a helicopter operation with a Texas company;
>
> 2. During 1970-77, Helicopteros purchased helicopters (approximately 80% of its fleet), spare parts, and accessories, costing more than $4,000,000, from a Texas company;
>
> 3. During 1970-77, Helicopteros sent prospective pilots to Texas for training;
>
> 4. Helicopteros sent management and maintenance personnel to visit Bell Helicopter in Fort Worth during the same period in order to receive "plant familiarization" and for technical consultation; and
>
> 5. Helicopteros received into its New York City and Florida bank accounts over $5,000,000 in payments from a Texas company drawn upon a Texas bank.

The Court analyzed the nature of Helicopteros' contacts with Texas, and held that they were not the kind of *continuous and systematic general business contacts* as required by *Perkins* to justify the exercise of *in personam* jurisdiction where the cause of action did not arise from those contacts. The Court emphasized that Helicopteros was not authorized to do business in the forum; never had an agent for service of process in the forum; never signed a contract in the forum; never solicited business in the forum; never had any employees based there; and never performed business operations in the forum. The same findings apply to FIBA.

The concurrent activities of FIBA and ABA/USA in the forum, as accurately characterized by the district court, are the result of the "idiosyncracy of the sport and the statutory existence of a national governing body within the realm of amateur basketball." App. B, 12a. FIBA does not act directly in Colorado, and its joint activities with ABA/USA are limited to instances when a United States amateur team is involved in international competition. This sporadic involvement with ABA/USA in the structure of international amateur competition is not the kind of continuous and systematic general business contact required by *Helicopteros* to satisfy due process.

The court of appeals misunderstood *Perkins* and *Helicopteros*, as it focused solely on the *number*, rather than the *nature* and *continuity* of FIBA's contacts with ABA/USA, to find *in personam* jurisdiction over FIBA on an unrelated cause of action. That focus contravenes the proper constitutional analysis required by *Perkins* and *Helicopteros*, where the type of contacts with the forum is closely studied to determine the fairness of requiring the nonresident defendant to anticipate being haled into the forum.

The consequences are serious. The court of appeals held that it does not offend due process to require FIBA to defend a lawsuit wherever its members are located, since FIBA "consists" of its members and "acts" through them. App. A, 7a. That conclusion substitutes a simplistic test of "membership location" for a careful analysis of the nature and continuity of contacts and the reasonable foreseeability of jurisdiction to determine the scope of *in personam* jurisdiction over foreign associations. In so doing, the court of appeals effectively removes any constraints on the exercise of *in personam* jurisdiction over nonresident associations if a member of that association is located in the United States. Of course an association "consists" of its members and "acts" through them: that is the inherent nature of that form of entity. But to elevate that inherent structure to impose jurisdiction wherever a member is located applies a test for *in personam* jurisdiction over an association which is not only unprecedented, but sharply differs from the result in *Helicopteros*, where this Court found more

substantial contacts of a *corporation* and *defeated* jurisdiction. If a different test of *in personam* jurisdiction is to be applied to associations, as compared to corporations, when deciding the constitutional reach of United States courts over foreign entities, this Court should make that decision. Review by this Court is warranted.

B. The Court of Appeals' Decision Extends *In Personam* Jurisdiction Over Foreign Entities to a Dangerous and Unprecedented Limit

Not only does the court of appeals' decision conflict with this Court's decision in *Helicopteros*, but it also ignores the vital significance in an *in personam* jurisdiction analysis of the substantive nature of the suit. The fairness of subjecting a nonresident to the jurisdiction of a United States court can only be accurately measured by a thorough analysis and understanding of the substantive right which has allegedly been infringed. Only then can a court determine whether the nonresident defendant should reasonably have anticipated being haled into the court of the forum when it took actions affecting the alleged right. Due process, and the decisions of this Court, dictate that much.

The court of appeals' decision is fundamentally defective. FIBA's actions relating to Behagen's international player's license and amateur sports status occurred exclusively in Europe and resulted in Behagen's ineligibility to compete as an amateur basketball player in Italy. The consequences of FIBA's action in denying Behagen the license had no impact on Behagen's professional or amateur activities in the United States or Colorado. Indeed, Behagen became subject to FIBA's rules and regulations when he voluntarily chose to compete as an amateur basketball player in Italy; FIBA, in accordance with its rules, properly considered Behagen as an Italian basketball player since he applied for an international player's license through the Italian Federation as a player for an Italian team. The facts on which Behagen relies to establish jurisdiction over FIBA relate solely to the activities of its American member, ABA/USA, taken with

respect to amateur United States teams. These activities, even if the presence of its member somehow translated into contacts by FIBA with Colorado, are not of the nature that FIBA could expect to be haled into court in Colorado on this case. The Colorado-based activities of ABA/USA are wholly unrelated to FIBA's actions taken in Germany which affected Behagen's asserted "right" to play basketball in Italy. As aptly articulated by the district court,

> [b]y no logical stretch of the imagination can it be said that by denying Mr. Behagen a license to play basketball in Italy, FIBA conceived itself subject to suit in the United States.

App. B, 13a.

Behagen is now permitted to seek redress in a United States court for an action taken in Germany by a German association, although Behagen was not injured nor deprived of any right in this country. That result extends jurisdiction over associations wherever their actions touch a United States citizen, even if there is no impact upon the rights, activities or conduct of the United States citizen in the forum. Due process prohibits such unbounded interference in the affairs of other nations.

The court of appeals' misguided decision dangerously extends *in personam* jurisdiction through a ritualistic application of one narrow element of a proper due process analysis—unrelated concurrent activities of FIBA and ABA/USA in the forum. But it is essential in the structure of an international amateur sport that there be some joint activity, on an international level, between an international sports federation and its members; without such mutual understanding and cooperation, international amateur sports would be in disarray and the organized presentation of international sports competition, such as the Olympics, would be impossible. However, to raise that mandated concurrent activity to a holding that FIBA should reasonably anticipate defending its rules in Colorado, even when its actions do not have impact there, is illogical and unfair, and contravenes the dictates of fairness as articulated by *International Shoe* and its progeny.

The court of appeals' holding is significant. Contrary to the decisions of this Court and the spirit of due process, a foreign association is now unable to reasonably evaluate the likelihood of being snared by United States courts when it takes *any* action which in *any* way affects a United States citizen in *any* area of the world; the practical effect of such a holding is to discourage such foreign entities from involvement with United States citizens in any form, employment or otherwise, for fear of being dragged to the United States to defend rules and regulations which have no impact on the rights of United States citizens in the United States. More than jurisdictional principles, however, are at stake: the court of appeals' decision has a debilitating effect upon the historical structure of international amateur athletic competition, as the entities in that structure are now precluded from reasonably anticipating where their actions will subject them to suit. The court of appeals' decision is important and erroneous.

CONCLUSION

This petition for a writ of certiorari should be granted and, upon review, the judgment of the court below should be reversed.

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February 4, 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RONALD BEHAGEN, Plaintiff-Appellant,	)	
vs.	)	No. 83-1435
AMATEUR BASKETBALL ASSOCIATION OF THE UNITED STATES OF AMERICA, FEDERATION INTERNATIONAL DE BASKETBALL AMATEUR AND WILLIAM WALL, Defendants-Appellees.	)	

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 82-JM-410)

Steven M. Schneebaum of Patton, Boggs & Blow, Washington, D.C. (Ronald H. Brown of Patton, Boggs & Blow; and William A. Palmer of Gibson, Gerdes & Palmer, Colorado Springs, Colorado, with him on the brief), for Plaintiff-Appellant.

Glen E. Keller, Jr. (John M. Rouche with him on the brief) of Davis, Graham & Stubbs, Denver, Colorado, for Defendant-Appellee Federation Internationale de Basketball Amateur.

Before: BARRETT, DOYLE, AND SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

Ronald Behagen, a basketball player, brought this suit against the Federation Internationale de Basketball Amateur (FIBA), the Amateur Basketball Association of the United States of America (ABA/USA), and ABA/USA's executive director William Wall. FIBA is the international association governing amateur basketball in its member countries, and ABA/USA is the American member of FIBA. The district court dismissed for lack of personal jurisdiction. It entered judgment under Fed. R. Civ. P. 54(b) to permit Behagen to appeal immediately. For the reasons set out below, we reverse.

Behagen played professional basketball in the National Basketball Association (NBA) from 1973 through 1979. In October 1979, Behagen accepted an offer from a team in the Italian basketball league. Although the Italian team gave Behagen a salary, transportation, and living accommodations, the league is nonetheless considered an amateur one by FIBA. The Italian league required Behagen to be qualified as an amateur, which apparently entailed receiving an ABA/USA travel permit or a FIBA license or both.[1] Behagen was reinstated as an amateur by FIBA, obtained a FIBA license, and played with the Italian league during its 1979-1980 season.

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[1]The record reveals some confusion on this issue. An affidavit by the Associate Executive Director of ABA/USA states that Behagen had never requested or received an ABA/USA travel permit, and that reinstatement to amateur status was a decision solely within the jurisdiction of FIBA. Indeed, defendants ABA/USA and Wall moved at one point to dismiss the action under Fed. R. Civ. P. 19 because Behagen had as yet failed to serve FIBA. In his deposition, however, Wall stated that when FIBA issues a license, it can order ABA/USA to issue a retroactive travel permit and ABA/USA will do so. Wall further stated that ABA/USA recommends reinstatement pursuant to FIBA regulations and issues travel permits certifying amateur status, and that such a determination has never been reversed by FIBA. Wall also testified that it is ABA/USA's responsibility as a FIBA member to notify FIBA when an American player turns professional.

In March 1980, Behagen returned to the United States and signed a "tryout" contract with the NBA Washington Bullets for the remaining two weeks of that team's season. He played in eight games with the Bullets but was not offered a contract for the coming season. In the summer of 1980, Behagen signed another contract with the Italian team. Behagen was subsequently informed by the team that his FIBA license had been revoked because he had played for the Bullets. FIBA purportedly has a rule prohibiting reinstatement to amateur status more than once. Without this document reflecting his amateur status, Behagen was no longer eligible to play in the Italian league.

Behagen then brought this suit against ABA/USA, FIBA, and Wall for damages, injunctive relief, and a declaratory judgment. In his complaint Behagen alleges that the decision to deny his second reinstatement to amateur status was made without giving him notice or a hearing, and was contrary to the regulations and practice of ABA/USA, FIBA, or both. Behagen asserts claims for breach of contract, denial of due process, tortious interference with contract, and antitrust violations.

FIBA filed a motion under Fed. R. Civ. P. 12(b)(2) to dismiss for lack of personal jurisdiction, contending that FIBA does not have sufficient minimum contacts with Colorado to support jurisdiction under the state's long-arm statute. Because both Behagen and FIBA offered affidavits and other written material on this issue, the district court treated the motion as one for summary judgment and granted it.

The plaintiff bears the burden of establishing personal jurisdiction over the defendant. *American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, N.V.*, 710 F.2d 1449, 1454 n.2 (10th Cir. 1983). Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. *Id.; Brown v. Flowers Industries, Inc.*, 688 F.2d 328, 332 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1275 (1983); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir.

1981); *Neiman v. Rudolf Wolff & Co.*, 619 F.2d 1189, 1190 (7th Cir.), *cert. denied*, 449 U.S. 920 (1980); *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. *American Land Program*, 710 F.2d at 1454. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party. *Id.* at 1454 n.2; *Marine Midland Bank*, 664 F.2d at 904; *Neiman*, 619 F.2d at 1190.

Behagen seeks to assert in personam jurisdiction over FIBA under Colorado's long-arm statute, which permits service of process outside Colorado upon any person subject to the jurisdiction of the courts of Colorado. Colo. Rev. Stat. §§ 13-1-124, -125 (1973). "In enacting the long-arm statute, the Colorado legislature intended to extend the jurisdiction of Colorado courts to the fullest extent permitted by the due process clause of the United States Constitution." *Waterval v. District Court*, 620 P.2d 5, 8 (Colo. 1980), *cert. denied*, 452 U.S. 960 (1981).

FIBA argues that Colorado cannot exert personal jurisdiction over it because it is an association with headquarters, staff, and offices in Munich, Germany; it has no office or assets in Colorado or even the United States; it is not licensed to do business in the United States; and it has committed no acts in the United States, in general, and Colorado, in particular. FIBA points out that Behagen's claim that he was denied the right to play basketball in Italy is unrelated to Colorado. In response, Behagen contends that personal jurisdiction over FIBA is proper in Colorado regardless of where the cause of action arose because FIBA has maintained continuous and substantial activity there through its American constituent, ABA/USA; in other words, FIBA is "present" in Colorado through ABA/USA.

If, as in this case, "the cause of action does not arise out of or relate to the foreign [defendant's] activities in the forum State, due process is not offended by a State's subjecting the [defendant] to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign [defendant]." *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 104 S. Ct. 1868, 1872 (1984)(footnote omitted). In *Hall,* the Supreme Court reaffirmed its decision in *Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437, 438, 445 (1952), that when a foreign defendant carries on a continuous and systematic part of its general business in the forum state through its agents, that state's exercise of jurisdiction over an unrelated cause of action is reasonable and just.

The Colorado courts have applied *Perkins* in holding that when a defendant has substantial, continuous contacts with the forum state, " 'jurisdiction may be found even when the cause of action does not arise out of the forum related activity.' " *Waterval,* 620 P.2d at 9 (quoting *Tucker v. Vista Financial Corp.,* 192 Colo. 440, 443, 560 P.2d 453, 456 (1977)); see also *Le Manufacture Francaise v. District Court,* 620 P. 2d 1040, 1047 (Colo. 1980)(en banc). Colorado consistently has distinguished between cases in which jurisdiction is sought based on a single isolated incident, and cases in which jurisdiction is predicated on allegations of continuous, substantial conduct in the forum state.[2] *See id.; see also Ruggieri v. General Well Service, Inc.,* 535 F. Supp. 525, 529 (D. Colo. 1982) (defendant is subject to personal jurisdiction of Colorado court if he is "present" in state).

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[2]Although FIBA urges us to apply the three-pronged test set out in *Van Schaak & Co. v. District Court,* 189 Colo. 145, 538 P.2d 425, 426 (1975) (en banc), that test is applicable only when "jurisdiction is based on a single act of the defendant." *Tucker,* 560 P.2d at 455-56. The Colorado courts clearly have recognized that the three-pronged test is not mandated by federal due process when the defendant's conduct in the forum is continuous and substantial. *See id.* at 456; *Le Manufacture Francaise,* 620 P.2d at 1047; *Waterval,* 620 P.2d at 9 & n.3. Thus the *Van Schaak* test is not the proper analytical framework for evaluating in personam jurisdiction in this case.

In support of its position that FIBA is "present" in Colorado through ABA/USA, Behagen made the following showing to the trial court. FIBA is the international association regulating amateur basketball in some 150 countries. Its members are the national bodies governing amateur basketball in each of its member nations. FIBA regulations are initiated in committees made up of various members, and ratified by the full body. ABA/USA, headquartered in Colorado, is the American organization governing amateur basketball in the United States, and the American member of FIBA. According to the 1981-82 ABA/USA Handbook, "[a]s the United States franchise holder to [FIBA], ABA/USA must adhere to the regulations and policies set forth by FIBA." Rec., vol. I, at 79. Significantly, the Handbook states that ABA/USA "*shall carry out the responsibilities of F.I.B.A.*" with respect to sanctioning FIBA competitions and determining player eligibility. *Id.* at 78 (emphasis added). The Handbook further provides that ABA/USA may sponsor both United States and foreign teams in competitions among FIBA member countries, and must ensure that only FIBA officials are used in these competitions. Pursuant to FIBA regulations, ABA/USA issues international travel permits certifying a player's amateur status and decides applications for reinstatement to amateur status. Defendant Wall stated in his deposition that if ABA/USA were not the FIBA member in the United States it would go out of business, *id.* at 51, and that "[e]verything that happens every place in the world in amateur basketball falls under the FIBA jurisdiction in every country." *Id.* at 69.

The above evidence constitutes a prima facie showing that FIBA maintains continuous and substantial activity in Colorado through the actions taken on its behalf by its constituent, ABA/USA. Viewed most favorably to Behagen, the record reflects that FIBA *is* its members, and that it governs internationally related amateur basketball through its member organization in each country.

Despite the district court's finding that "ABA/USA functions for FIBA in the United States," rec., vol. I, at 106, it concluded that the record contains an insufficient factual basis for finding that FIBA and ABA/USA are either the same entity or principal and agent. Under Colorado law, however, the issue of agency is a fact question. *See, e.g., Dailey v. Elicker,* 447 F. Supp. 436, 439 (D. Colo. 1978); *Shriver v. Carter,* 651 P.2d 436, 439 (Colo. Ct. App. 1982). On this record, there clearly are fact questions regarding the relationship between FIBA and ABA/USA that cannot be determined summarily.

The district court also concluded that FIBA's contacts with Colorado through ABA/USA were insignificant. It based its conclusion in part on the fact that the concurrent activity of FIBA and ABA/USA was not a joint "commercial" endeavor. However, the due process clause does not require that a foreign defendant's contacts with the forum state be commercial in nature. *See Nova Biomedical Corp. v. Moller,* 629 F. 2d 190, 193 (1st Cir. 1980) (state long-arm statute extending jurisdiction to federal constitutional limits not limited to commercial activity by defendant); *McLean v. Church of Scientology,* 538 F. Supp. 545, 549-50 (M.D. Fla. 1982) (commercial transaction for pecuniary benefit not required under liberally construed long-arm statute). Even though FIBA and ABA/USA are not involved in a commercial endeavor, FIBA may still conduct significant activity in Colorado through ABA/USA for purposes of long-arm jurisdiction.

Behagen has presented facts tending to show that FIBA consists of its members, that FIBA operates through committees made up of members, that the members promulgate the governing rules as a congress, and that FIBA govern internationally related basketball in each country through its member organization there. We conclude that it would not offend due process to require FIBA to defend a lawsuit wherever members conduct FIBA activities if FIBA in fact consists of its members and acts only through them. The undeveloped record in this case reveals that there exist factual disputes material to these issues. Therefore summary judgment

was inappropriate. *See* Fed. R. Civ. P. 56(c); *Houghton v. Foremost Financial Services Corp.*, 724 F.2d 112, 114 (10th Cir. 1983).

We reverse the district court's order dismissing this action against FIBA. The case is remanded for further proceedings.

No. 83-1435

RONALD BEHAGEN v. AMATEUR BASKETBALL ASSOCIATION OF THE UNITED STATES OF AMERICA, AND FEDERATION INTERNATIONALE DE BASKETBALL AMATEUR

BARRETT, Circuit Judge, dissenting.

I have concluded that the district court's dismissal of FIBA for want of *in personam* jurisdiction was proper. In my view, the district court correctly analyzed the structure of FIBA and ABA/USA from the pleadings and concluded correctly that: when FIBA denied Behagen a license to play in Italy, it was acting against him as an Italian, not an American, basketball player; FIBA's action had nothing to do with Behagen's standing as an amateur in America and any impact felt by Behagen was in Italy, not in the United States, for the "right" advanced here by Behagen was that of playing basketball in Italy; giving credence to Behagen's theory could only result in the creation of a right to sue in Italy; Behagen postulates simply that because FIBA performed an act in Germany (revocation of his license) which Behagen *felt* in the United States, FIBA is answerable to the jurisdiction of an American court—a postulation which, if applied, would lead to mischief neither contemplated nor countenanced by law.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-JM-410

RONALD BEHAGEN,

Plaintiff,

vs.

AMATEUR BASKETBALL ASSOCIATION OF THE UNITED STATES OF AMERICA, et al.,

Defendants.

ORDER

THIS MATTER arises under Fed. R. Civ. P. 12(b)(2) upon a motion filed by the Federation International de Basketball Amateur (FIBA). FIBA maintains it has not had any contacts with the state of Colorado which would form a basis for this court's jurisdiction over it.

According to the pleadings and affidavits filed in this matter, FIBA is an association which has headquarters and offices in Munich, Germany. Under German law, FIBA has no legal "personality." As I understand the situation, FIBA is an international sports federation with international authority over amateur basketball. FIBA is before this court because Plaintiff, a putative amateur basketball player, alleges FIBA has taken action against him which adversely affects his rights in the U.S.A.

To make the legal issue clear, one must understand certain facts gleaned from the complaint. Plaintiff is a resident of the state of Georgia who has been an amateur basketball player in Italy. After playing one year in Italy, Plaintiff signed a contract with, and briefly played for, an American professional basketball team. When the professional contract was not renewed, Mr. Behagen attempted to return to Italy to resume his amateur status; however, he subsequently learned the international license necessary to his playing in Italy had been revoked by FIBA.

Mr. Behagen's Italian team advised him the license had been revoked either by FIBA or its codefendant, American Basketball Association of the United States of America (ABA/USA).[1] Upon protest by Behagen to ABA/USA, he was allegedly advised the revocation was predicated upon a FIBA rule which prohibits more than one reinstatement to amateur status.[2] The present suit seeks to challenge the alleged rule and the revocation of Plaintiff's international amateur license, among other things. Although the complaint casts ABA/USA in the role of FIBA's alter ego, that status is denied by FIBA. So too is any assertion ABA/USA is FIBA's agent.

It appears from the affidavits and pleadings, as well as from the provisions of 36 U.S.C. § 391, the relationship between FIBA and ABA/USA is somewhat ephemeral. While it would appear amateur basketball at the international level is conducted under the aegis of FIBA, it also is evident the actual playing of the sport depends upon a national focus of some sort. It is also evident, however, the relationship between the two organizations is far from those typically found in commercial endeavors.

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[1]ABA/USA is the national governing body for amateur basketball in the United States as designated by the United States Olympic Committee pursuant to 36 U.S.C. § 391(a).

[2]Prior to playing in Italy, Behagen had been a professional basketball player in the U.S.; therefore, in order to play the first time in Italy, he needed to be "reinstated" as an amateur.

I would conclude generally that within the loose framework of international amateur basketball, ABA/USA certainly performs functions which effect the international policies of FIBA. Yet, on the basis of the facts before me, it is exceedingly difficult to find a basis for concluding FIBA and ABA/USA are either the same entity or principal and agent.

Plaintiff contends that ABA/USA is FIBA in the United States; hence when ABA/USA acts, FIBA acts, and vice versa. To a certain extent that is true, for both organizations have certain concomitant interests involving basketball at the international level.

Indeed, when a United States team is involved in competition with a foreign team—either here or in another country—ABA/USA has an involvement. Among other things ABA/USA obtains FIBA certified officials to conduct the contest; it insures the application of FIBA rules; in short, it generally oversees the conduct of the competition in the interest of international amateur competition. Yet, ABA/USA by statute must have independent authority, 36 U.S.C. § 391(b)(4), and it has more national than international duties. 36 U.S.C. § 392. ABA/USA functions for FIBA in the United States because it is legally created to do so, 36 U.S.C. § 391(a), and because FIBA does not itself function within our borders. (Affidavit of Boris Stankovic, ¶6.)

Thus, while it is true, as Plaintiff alleges, that ABA/USA performs functions for FIBA, it seems clear to me those functions are solely due to the nature and structure of the federation of international basketball rather than to a business association. The idiosyncrasy of the sport and the statutory existence of a national governing body within the realm of amateur basketball mandates the concurrent activities of FIBA and ABA/USA , not their joint commercial endeavor. Indeed, there is no commerce transacted by either organization, and the existence of both entities is solely dependent upon the perpetuation of sport.

I must therefore conclude that FIBA has insignificant contact, if any, with the United States and none with the state of Colorado. Plaintiff seeks to avoid this conclusion by remonstrating that by

affecting his rights in the United States, FIBA has made contact with this country for the purpose of personal jurisdiction. I believe the argument neglects the facts.

When FIBA denied Mr. Behagen a license to play in Italy, it was acting against him as an Italian, not an American, basketball player. FIBA's action had nothing to do with Plaintiff's standing as an amateur in America; to the contrary, any impact felt by Mr. Behagen was in Italy, not the United States, for Mr. Behagen's "right" was to play Italian basketball. If that right exists, it must—in the nature of this case—exist only in Italy. Hence, even giving credence to Plaintiff's theory could only result in the creation of a right to sue in Italy.

More fundamental, however, is the fact Plaintiff has offered no support for the theory. Remember, he postulates that simply because FIBA performed an act in Germany which Mr. Behagen felt in the United States, FIBA is answerable to the jurisdiction of an American court. This postulation, if applied, would lead to mischief neither contemplated nor countenanced by law.

By no logical stretch of the imagination can it be said that by denying Mr. Behagen a license to play basketball in Italy, FIBA conceived itself subject to suit in the United States. The due process protection invoked by the tests mandated in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945); *Hanson v. Denkla,* 357 U.S. 235 (1958); and *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980); would not permit this court to reach out and snare FIBA. Accordingly, it is

ORDERED the motion of Federation International de Basketball Amateur to dismiss is granted, and the action against it is dismissed. Costs are awarded to the Defendant FIBA.

DATED at Denver, Colorado, this 16th day of February, 1983.

APPENDIX C

SEPTEMBER TERM — November 6, 1984

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

RONALD BEHAGEN, Plaintiff-Appellant,	)	
vs.	)	No. 83-1435
AMATEUR BASKETBALL ASSOCIATION OF THE UNITED STATES OF AMERICA, FEDERATION INTERNATIONAL DE BASKETBALL AMATEUR AND WILLIAM WALL, Defendants-Appellees.	)	

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard. Judge Barrett voted to grant rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the

panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.